

A **DAPAN CONSTRUCTION SDN BHD**

v.

UNI-MIX SDN BHD

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: S-02-820-2007]
C 13 OCTOBER 2008

COMPANY LAW: *Winding up - Petition - Appeal against - Whether debt asserted bona fide disputed on substantial grounds - Companies Act 1965, s. 218*

D This was an appeal against the order of the High Court winding up the appellant company. The respondent, contending that it was owed a sum of RM817,877.76 by the appellant, served the appellant with a statutory demand under s. 218 of the Companies Act 1965 and then presented a winding up petition on the ground
E that the demand had not been complied with. The trial judge allowed the respondent's petition, resulting in the present appeal.

Held (allowing the appeal and dismissing the respondent's petition)

F **Per Gopal Sri Ram JCA delivering the judgment of the court:**

(1) The trial judge erred in accepting the version put forward by the respondent in its affidavits when those allegations were
G credibly denied by the appellant in its affidavits. The respondent, based on the material in the appeal record, was not entitled to have the appellant wound up as the debt asserted was *bona fide* disputed on substantial grounds. *Syarikat Mohd Noor Yusof Sdn Bhd v. Polibina Engineering Enterprise Sdn Bhd* (foll). (paras 4 & 6)
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Bahasa Malaysia Translation Of Headnotes

I Ini ialah rayuan terhadap perintah Mahkamah Tinggi yang membenarkan penggulangan perayu. Responden, yang menghujah bahawa ianya dihutang amaun sebanyak RM817,877.76 oleh perayu, mengenakan perayu dengan satu tuntutan statutori di bawah s. 218 Akta Syarikat 1965 dan selepas itu mengemukakan

sesuatu petisyen penggulungan atas alasan bahawa tuntutan tersebut tidak dipatuhi. Hakim perbicaraan membenarkan petisyen responden, mengakibatkan rayuan ini.

Diputuskan (membenarkan rayuan dan menolak petisyen responden)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- (1) Hakim perbicaraan khilaf dalam menerima versi yang diujahkan oleh responden dalam afidavitnya apabila dakwaan tersebut telah dinafikan secara boleh percaya oleh perayu dalam afidavitnya. Responden, berdasarkan material dalam rekod rayuan, tidak berhak menyebabkan perayu diggulkan sebab hutang yang diujah telah *bona fide* dipertikai atas alasan substantif. *Syarikat Mohd Noor Yusof Sdn Bhd v. Polibina Engineering Enterprise Sdn Bhd* (diikuti).

Case(s) referred to:

Grundt v. Great Boulder Pty Gold Mines Ltd [1937] 59 CLR 641 (**refd**)
Syarikat Mohd Noor Yusof Sdn Bhd v. Polibina Engineering Enterprise Sdn Bhd [2005] 2 CLJ 676 CA (**fol**)
Yeoman's Row Management Limited and Another v. Cobbe [2008] UKHL 55 (**refd**)

Legislation referred to:

Companies Act 1965, s. 218

For the appellant - Marina Tiu; M/s Yap Chin & Tiu

For the respondent - Baldev Singh; M/s Baldev Gan & Assoc

[Appeal from High Court, Kota Kinabalu; Companies (Winding-Up) No: K28-31-2007]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal is directed against the order of the High Court winding up the appellant company. The underlying facts are these.

- A [2] The appellant and another company, Dapan Holdings Sdn Bhd are both common subsidiaries of Karambunai Resorts Bhd. The respondent and a company called Hypervictory Sdn Bhd are common subsidiaries of B.I.G. Industries Berhad. Dapan Holdings is the developer of the Bandar Sierra housing project. The
- B appellant is the main contractor for that project. By an agreement dated 10 September 2004, Dapan Holdings granted a company called Zillion Rank Sdn Bhd the exclusive licence to extract rocks and quarry products from the site of the Bandar Sierra project. In
- C September 2004, Zillion appointed Hypervictory as its sub-contractor to carry out the quarrying works. At about the same time, the respondent commenced the sale of ready mixed concrete to the appellant for use at Bandar Sierra. Later, the respondent took the position that it was owed a sum of RM817,877.76 by the appellant. It served the appellant with a statutory demand
- D under s. 218 of the Companies Act 1965 and then presented a winding up petition on the ground that the demand had not been complied with.

- E [3] Now, there is no doubt that the case has been complicated by the existence of wholly owned subsidiaries. Yet it is clear from the evidence on record that for the purposes of the dealings between them, the parties to the several transactions, including the appellant and the respondent treated the cross transactions between the respective subsidiaries as forming a set-off as between
- F them. Indeed, there is evidence of previous instances of claims outside the immediate arrangement between the appellant and the respondent but involving the other common subsidiaries on either side being set off with no objections from the respondent. In short, during the course of their dealing they chose to disregard
- G the separate and individual corporate personality of the other companies with which each was associated and instead treated the holding company and subsidiary as one and the same corporate individual. Each side is therefore estopped from relying on the corporate veil of the other companies to defeat the other's
- H legitimate claims. The most recent and authoritative statement of the doctrine is to be found in the speech of Lord Scott of Foscote in *Yeoman's Row Management Limited and Another v. Cobbe* [2008] UKHL 55 in the following terms:

- I An 'estoppel' bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel.

[4] It is apparent from the judgment of the learned judge that he did not sufficiently direct himself upon the documentary evidence that supported the appellant's right of a set-off against the respondent in respect of transactions between common subsidiary companies on either side. In our judgment where the learned judge erred was in his acceptance without more of the version put forward by the respondent in its affidavits when those allegations were credibly denied by the appellant in its affidavits. To reiterate, the learned judge appears to have overlooked the evidence of the conventional basis on which the parties conducted themselves towards each other. To quote from the judgment of Dixon J in *Grundt v. Great Boulder Pty Gold Mines Ltd* [1937] 59 CLR 641:

Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs. A tenant may know that his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him from relying on the defect. Parties to a deed sometimes deliberately set out an hypothetical state of affairs as the basis of their covenants in order to create mutual estoppel. In *Craine's Case* (*Craine v. Colonial Mutual Fire Insurance Co* [1922] 2 AC 541), both parties may have been aware that the claim of the insured was out of time. In his interesting judgment in *Ferrier v. Stewart* [1912] 15 CLR 32, at pp. 44-46, Isaacs J held that an indorser of a promissory note was precluded from showing that at the time when he placed his signature upon the back of the note it was payable to the order of a payee who had not indorsed it and that there had been no delivery of the note. The ground on which his Honour put the estoppel simply was that the parties adopted a conventional basis for the transaction. They impliedly agreed that, when the promissory note should be completed by other indorsements, it should be assumed to have been issued and indorsed by the parties in due order. From this assumption the indorsee was not permitted to depart, although all parties had been aware of the actual state of affairs.

[5] It remains now for us to decide whether the respondent was entitled to petition to wind up the appellant in reliance of the s. 218 notice when the debt it claimed was *bona fide* disputed on substantial grounds. In this regards we find it unnecessary to do more than quote from the judgment of this court delivered by Mohd Ghazali JCA in *Syarikat Mohd Noor Yusof Sdn Bhd v. Polibina Engineering Enterprise Sdn Bhd* [2005] 2 CLJ 676:

- A We are aware that it is not provided under the Act that a petitioner must be armed with a judgment debt prior to the filing of a petition to wind up a company. In the matter before us, there is no judgment debt and the debt claimed is disputed. We are of the view that a notice of indebtedness issued under s. 218 of the Act is not evidence of the debt.
- B ...
- C Where the amount is questionable or suspect and there is no judgment sum to support it, the petition should be dismissed. In *Re Ban Hong Co Ltd* [1959] MLJ 100, it was held that a petition instituted for the purpose of enforcing a disputed debt is an abuse of process of the court and will be dismissed with costs. Rigby J said (at p 103):
- D It is well settled law that a winding up petition is not to be used as machinery to try a common law action, and that the presentation of a petition for winding up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the court and should be dismissed with costs.
- E [6] Applying the principle in *Polibina Engineering*, the respondent, based on the material in the appeal record was not entitled to have the appellant wound up as the debt asserted was *bona fide* disputed on substantial grounds. Hence, for the reasons already given, the appeal was allowed with costs here and in the court below. The respondent's petition was dismissed. The deposit in
- F court was ordered to be paid out to the appellant.

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